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No. 880

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

HARRY J. ALKER, JR., AND MAMIE DUBAN, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF ALFRED A. DUBAN, DECEASED,

Petitioners,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

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Opinions Below

The opinion of the trial court (R. 475a), the District Court for the Eastern District of Pennsylvania, is not reported. The opinion of the Circuit Court of Appeals for the Third Circuit is reported in 151 F. (2d) 907.

Jurisdiction

The judgment sought to be reviewed was entered on November 7, 1945, by the Circuit Court of Appeals for the Third Circuit (R. 561); a petition for rehearing was

denied by that court on December 12, 1945 (R. 571). The petition for a writ of certiorari was filed on February 23, 1946. Petitioners rely upon section 240(a) of the Judicial Code as amended (U. S. C. Title 28, section 347(a)).

Questions Presented

1. Whether the United States District Court properly found, as a question of fact, that no oral agreement existed between the Integrity Trust Company and the petitioner Alker by which the bank, and the Federal Deposit Insurance Corporation as its transferee, were legally bound to refrain from demanding payment of a promissory note executed to the bank by Alker, or from liquidating the collateral security in accordance with the terms of the note, or from exercising the rights expressly granted therein.

2. Whether the Court below properly ruled that, even if such an oral agreement did exist, it constituted a "secret" agreement within the ruling of this Court in *D'Oench, Duhme & Co. Inc.* v. *FDIC,* 315 U. S. 447, reh. den., 315 U. S. 830, and was not enforceable against the Federal Deposit Insurance Corporation.

Statement of Case

This is a civil suit brought by the Federal Deposit Insurance Corporation to recover a deficiency judgment against the defendant Alker for the balance due from him on a demand note, after crediting the proceeds of the sale of 4400 shares of National Dairy Products Corporation common stock and other marketable collateral held as security, for an adjudication that neither the defendant DuBan nor the Estate of Alfred A. DuBan has any interest in said shares of National Dairy stock, or the dividends declared thereon since November 20, 1942, and for a decree requiring the defendant National Dairy to transfer the stock upon its books to the Federal Deposit Insurance Cor-

poration and to pay the latter all dividends accrued thereon (R. 24a). After trial without a jury the court filed an opinion (R. 475a) and judgment was entered for the plaintiff against the defendant Alker in the sum of $117,581.35 (R. 493a) and National Dairy was directed to make the said transfer and to pay over the said dividends (R. 492a). Upon appeal by Alker and DuBan (R. 507a) the judgment was affirmed by the Circuit Court of Appeals for the Third Circuit.

The pertinent facts surrounding this litigation are as follows: In October 1929 the defendant Alker had a large broker's loan secured by marketable collateral which was taken over by the Integrity Trust Company on a collateral demand note in the amount of $592,150 secured by various stock, including 3400 shares of National Dairy Products Corporation common stock loaned to Alker by Alfred A. DuBan for that purpose. At the instance of the Trust Company, Alker executed two notes in May 1931, in the amount of $350,000 and $242,152, respectively, to replace the original note and secured by the same collateral (R. 182a). The market value of the securities declined and the Trust Company demanded additional collateral (R. 184a). Pursuant to the demand, Alker and Fischer, a director of the bank, acting as intermediary for Alker, conferred with certain of its officers, particularly its president Hardt. To meet the demand Alker deposited 1,000 more shares of National Dairy stock, which he borrowed for the purpose from Mr. DuBan, took out an additional $100,000 of life insurance (having already theretofore pledged $25,000 of insurance), and executed a document purporting to assign, so far as they were assignable, claims against the Commonwealth of Pennsylvania for legal services (R. 183a).[1]

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[1] Alker testified that "the Commonwealth doesn't recognize assignments and the fees came to me" (R. 203a).

On December 11, 1936, Alker executed the note on which this suit is brought. It is an ordinary collateral form note payable on demand, listing the items of collateral, and containing the notation that it was given "in substitution and continuance" of the demand notes of May 26, 1931 (R. 508a). Interest thereon was paid and a number of payments were made on account of principal and duly endorsed on the note.

On January 13, 1940, Integrity Trust Company pledged the note and the collateral, together with all its other banking assets, except certain cash items, as security for a loan of some $20 million made to it by the Federal Deposit Insurance Corporation (R. 71a, 75a, 80a, 83a). The note in suit was endorsed and delivered to the Federal Deposit Insurance Corporation (R. 509a). Thereafter Integrity Trust Company closed and the Secretary of Banking became receiver in accordance with the Pennsylvania statutes. Integrity Trust Company was an insured bank under the Federal Deposit Insurance law (79a). It was closed under an arrangement by which all of its depositors, large and small, were paid in full (R. 81a). Authority for this transaction is contained in the Federal statutes (12 U. S. C., section 264(n)(4)). The arrangement was similar to that described in *Nichols* v. *National City Bank of Lynn*, 48 N. E. (2d) 49 (Mass., 1943), cert. den., 320 U. S. 742 and the one which this Court had occasion to examine in *D'Oench, Duhme & Co., Inc.*, v. *FDIC*, 315 U. S. 447, reh. den. 315 U. S. 830. See also *Lamberton* v. *Federal Deposit Insurance Corporation*, 141 F. (2d) 95 (C. C. A. 3, 1944), and *Brown* v. *N. Y. Life Ins. Co.*, 152 F. (2d) 246 (C. C. A. 9, 1945).

Promptly after January 15, 1940, various officers of the Federal Deposit Insurance Corporation communicated with

Alker concerning his loan.[2] He contended that there was an oral agreement between him and the Integrity Trust Company prohibiting the sale of the securities or the calling of the note. The Federal Deposit Insurance Corporation, however, made it clear to Alker from the very beginning that it did not consider itself bound by any such agreement, even if one had been made as he asserted, and he was requested to establish that such an agreement did in fact exist.

In November 1942 formal demand was made for the payment of the note, the demand was not met and the note thereafter remained unpaid. The securities constituting the collateral securing the note were sold after formal notice of sale to Alker, to the defendant DuBan, and to others who represented, or purported to represent, either Alker or Mrs. DuBan. The plaintiff bought in the collateral at the current market prices (R. 127a). The proceeds of the sale of the collateral were applied against the outstanding balances of principal and interest on the note and this suit was thereafter instituted to collect the balance remaining unpaid thereon. Petitioners seek to impugn the validity of the collateral sale by referring to it as a "so-called alleged private sale", by contending that it "was not advertised", that "no notice of it appeared on the bulletin board in the corridor of the Federal Deposit Insurance Corporation", and that "the alleged sale took place in a room on the second floor rear of the Corporation's building late in

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[2] Petitioners' brief, p. 14, says: "Mr. Teft, the chief supervisor of the Federal Insurance Corporation, wrote Mr. Alker requesting a conference to discuss his loan. The letter stated that it (Federal Deposit Insurance Corporation) understood there was an oral agreement concerning said loan and they wanted to discuss it." What the letter actually said was this (R. 552a): "You spoke of an agreement between you and the former President of the Integrity Trust Company with respect to your indebtedness. We should appreciate your furnishing us with a copy of such an agreement, as we have been unable to locate it in the files of the bank."

the afternoon, with no one present except two employees of the Corporation" (Petitioners' brief, p. 15). The record discloses, however, that Alker did receive at least six days' written notice of the day and hour of the sale; that he was invited to attend the sale but left the building immediately before it started; that the sale was conducted with all due formality; that stenographic minutes were taken; that the sale did not purport to be a public sale but a sale in precise accordance with the provisions of the note; and that such sale had marked advantages from Alker's point of view (R. 112a, 118a, 119a, 122a-136a, 143a, 144a, 320a, 526a). Indeed, the sale was postponed several times at Alker's request for a total of some 50 days from its original date (R. 480a). During that time he never asked that a public sale be held nor did he ever seek to enjoin it on the ground that it was improper. The trial court properly found that "the sale was within the powers given in the note and that it was legal and effective" (R. 480a).

The defense contended that an agreement existed between Alker and the Integrity Trust Company which, it was asserted, was binding upon the Federal Deposit Insurance Corporation, and which would have precluded either the Trust Company or the Federal Deposit Insurance Corporation, as its transferee, from selling the collateral as it did or from claiming a deficiency against Alker as demanded in the instant litigation.

Alker testified that the additional collateral was put up in September 1931, "provided they did not disturb the loan but carried the loan and did not disturb the collateral until he (DuBan) got his collateral back and the others who put up collateral got theirs back and I got my equity in the loan" (R. 187a). Fischer testified that Hardt agreed "he would not disturb the loan so long as the interest is met every month and the policies are kept up" (R. 249a). Hardt denied that he had said the bank would not call the loan or

sell the collateral (R. 256a) but said he did inform Alker and Fischer that "our attitude was one of complete co-operation" (R. 255a) and that "we would do everything reasonable within our power to make it possible for him to liquidate the loan ultimately at his convenience and at such a time as might cause him the least embarrassment" (R. 255a). Semisch, vice president and treasurer of the bank, testified that he did not recall the visit but denied that he had made any agreement concerning the calling of the loan or the selling of the collateral (R. 270a).

When the stock was pledged, Mr. DuBan gave Alker a power to pledge securities, witnessed by Fischer, which was in the customary form, authorizing the bank to use the stock as the absolute owner thereof (R. 521a). It contained no reference to the alleged agreement. No record of any sort was made of the alleged agreement (R. 273a, 281a); no memorandum was made of it (R. 259a); nothing to that effect was endorsed on the notes (R. 544a-547a). Neither the minutes of the directors nor of the executive committee referred to it (R. 328a-340a); the bank's books of account did not reflect it (R. 280a), and the bank examiners who examined the bank from time to time found no record of it (R. 278a, 280a, 295a, 298a, 307a). In discussing the loan with officers of the bank (R. 277a, 298a-300a), no reference was made to any such agreement. In their reports to their superiors, which were in turn submitted to the bank directors, the bank examiners made no mention of any such agreement, and they appraised the loan at a higher figure than they would have appraised it had they known of any "strings" attached to it (R. 289a-294a, 300a-301a). In all the correspondence between Alker and the bank concerning the loan, there is no reference whatever to the supposed agreement (R. 473a). All this, the Circuit Court of Appeals found to be a fact (R. 558).

The trial court held that the principal issue raised by the evidence was one of fact and posed the issue as follows (R. 478a): "Was there a complete enforceable agreement made on September 29, 1931 between the defendant Alker and the Integrity Trust Company by which the bank legally bound itself to refrain from demanding payment of the note or from liquidating the collateral in accordance with the terms of the instrument?" The court found that the evidence "is not sufficient to prove the existence of a legally enforceable contract which would in law or equity preclude the holder of a note, and its succesors in title, from exercising the rights expressly granted in the written instrument", and added: "Nor are we convinced that such an agreement was intended at the time" (R. 479a). The trial court further said: "Even if the language could be construed to mean that the bank bound itself not to exercise its rights under the terms of the note, the agreement lacks essential definiteness and certainty—certainty as to proof and certainty as to the time of performance, that is, the limit of the restraint" (R. 479a). The trial court concluded "that the sale was within the powers given in the note and that it was legal and effective" (R. 480a).

In affirming the judgment, the Circuit Court of Appeals assumed that the officers of the bank agreed that it "would not disturb the loan or the collateral until security values had risen to such a point that Alker could recover his 'equity'," and further assumed "that there was a valid oral contract to this effect and that Alker and DuBan did everything required of them by this contract" (R. 558). Pointing out, however, the absence of any record of any kind of the alleged agreement, the Circuit Court held that the facts in the case at bar resembled those in *D'Oench, Duhme & Co. Inc.* v. *FDIC*, 315 U. S. 447, reh. den., 315 U. S. 830, and concluded: "The contract which we have assumed existed in the precise terms contended for by the individual defendants is

a 'secret' agreement within the ruling of the Supreme Court in the D'Oench, Duhme case. * * * As such it is not enforceable against FDIC."

Argument

Neither the petition nor the brief in its support justifies the grant of a writ of certiorari in this case. The petitioners present no special or important reasons justifying review on certiorari. The decision of the Circuit Court of Appeals below represents no conflict among circuits, nor is there involved here an important question of federal law which has not been settled by this Court or which has been decided in conflict with any decision of this Court. Quite the contrary, the Circuit Court of Appeals applied, and correctly, the rule laid down in *D'Oench, Duhme & Co.* in which this Court settled the question which petitioners propose to raise.

The case at bar involves a not uncommon occurrence: an effort on the part of a debtor, in a suit brought by the Federal Deposit Insurance Corporation to recover a balance due upon a promissory note, to escape liability and defeat recovery by pleading an alleged "side" agreement with the bank, that in effect, the note is not what on its face it purports to be. Cf. *D'Oench, Duhme & Co. Inc.* v. *F. D. I. C.*, supra; *Deitrick* v. *Greaney*, 309 U. S. 190; *FDIC* v. *Pendleton*, 29 F. Supp. 779 (W. D. Ky., 1939); *FDIC* v. *Woods*, 34 F. Supp. 296 (W. D. Ky., 1940) cited in *D'Oench, Duhme & Co. Inc.* v. *F. D. I. C.*, 315 U. S. 447, at p. 462; *FDIC* v. *Vest*, 122 F. (2d) 765 (C. C. A. 6, 1941) cert. den., 314 U. S. 696. Here the debtor asserts, in substance, an alleged oral agreement that he was not to be held responsible on the note but that the bank was to carry the loan undisturbed until the collateral reached a value sufficient to enable it to pay the note in full and to return a portion of the security to him.

Assuming that a bank had the power to enter into such an engagement, the practical effect of which is to postpone payment of the note indefinitely, and perhaps forever, to give the bank a promissory note upon which there is no personal liability, to preclude the bank from disposing of the security —all in direct contradiction of the express provisions of the note—and, in effect to place it in the position of a "stock market" investor, it taxes credulity that the bank's officers did so bind the bank. Surely, the facts here disclose a case for estoppel in order that a well-defined federal policy be not defeated.

The trial court found as a fact that there was no oral agreement such as was contended for by the defendants in resisting the claim asserted by the plaintiff in its complaint. It was the task of the trial Judge to evaluate the testimony and to pass upon the relative credibility of the witnesses who testified with respect to the conversation out of which Alker contended the agreement arose. The trial court's conclusion, upon weighing the evidence, is patently not subject to review as it is purely and wholly a question of fact. What is more, the trial court concluded that even if an arrangement, such as Alker asserted, did exist, it was insufficient to preclude the plaintiff from selling the collateral or from enforcing the obligation to pay the balance due upon the note after crediting the proceeds of sale.

Since the Circuit Court of Appeals assumed, for the purposes of its decision, that the agreement which Alker urged did in fact exist, it did not reach the question of fact so decided by the trial Court. It held that, notwithstanding the existence of such an agreement, the plaintiff was entitled to recover since the agreement constituted no defense within the rule laid down in the *D'Oench, Duhme & Co.* case. Except for the fact that in the *D'Oench, Duhme & Co.* case the agreement was written, while in the case at bar it is contended that the agreement was oral, the

transactions are identical. Defendants' argument that the cases are different because the plaintiff in the instant case did not allege in its complaint that the agreement existed and that it was a fraud, while such allegations were contained in the reply in the *D'Oench, Duhme & Co.* case, is to no avail. In the *D'Oench, Duhme & Co.* case, the FDIC filed a reply to the defense, which was based upon an agreement in writing which actually did exist, and contended that it was not bound thereby. In the instant case, however, the Corporation took the position *that no such agreement existed;* consequently, it was not incumbent upon it to allege the same in its complaint and to seek avoidance thereof by claiming it to be a fraud or to file a reply addressed to the defense.[3] Accordingly, it had to be left to the defendant to plead that such an agreement did exist—which he did—and the court was thereupon called upon to determine whether the agreement in fact existed and whether, if existant, it constituted a sufficient defense to the action.

The other asserted distinctions between this case and the *D'Oench, Duhme & Co.* case (Petitioners' brief, p. 20-21) are patently trivial and immaterial.

Petitioners' argument addressed to the fact that the court below cited section 264(s) of 12 U. S. C. raises no substantial question. As was plainly pointed out in the *D'Oench, Duhme & Co.* case (as well as in *Deitrick* v. *Greaney,* 309 U. S. 190) the reach of the rule which prevents the maker of a note from avoiding liability by claiming an agreement such as is here contended "is not delimited to those instances where he has committed a statutory offense" (315 U. S. 458). On the contrary, the defense is not allowed in any case "where his act contravenes a general policy to protect the institution of banking from such secret

[3] Since the defendants' answers contained no counterclaim "denominated as such," a reply was not required (Rules of Civil Procedure, Rule 7).

agreements" (*ibid*). And as this Court further stated in that case, the principles are applicable "because of the federal policy evidenced in this Act (section 12B of the Federal Reserve Act, as amended, 12 U. S. C. section 264) to protect respondent (FDIC), a federal corporation, from misrepresentations made to induce or influence the action of respondent, including misstatements as to the genuineness or integrity of securities in the portfolios of banks which it insures or to which it makes loans" (315 U. S. 459).

Nor is the fact that the court below found no fraud of any significance. Obviously since the trial court found that there was *no agreement,* such as was contended for by the defendants in attempting to defeat recovery, it could hardly have found fraud. The Circuit Court of Appeals, however, assuming that the agreement as pleaded by the defendants did exist, stated that it fell under the ban of the *D'Oench, Duhme & Co.* case. There is no inconsistency in these holdings; nor is there any basis for contending that the Circuit Court of Appeals found, as a fact, something which the trial Judge had failed to find.

Petitioners' reliance upon *Deitrick* v. *Standard Surety and Casualty Co.,* 303 U. S. 471, is misplaced. As was pointed out by this Court in *Deitrick* v. *Greaney,* supra, the *Standard Surety* case failed because on the pleadings there the receiver *relied upon the bank's rights alone,* and since the bank could not recover, because of the fraud of its officers, the receiver perforce failed to recover in the absence of a showing that creditors' rights were involved. In the case at bar, on the other hand, *the Corporation is not suing as receiver, nor is it relying upon the bank's rights alone;* it is suing as transferee for value, without notice, and, consequently, is entitled to recovery.

As to the Petitioners' effort to invoke state law, we need only refer to the Court's rulings in *Awotin* v. *Atlas Ex-*

change National Bank, 295 U. S. 209 and subsequent cases applying the principle there laid down. See also, *D'Oench, Duhme & Co., Inc.,* v. *F. D. I. C.* and *Deitrick* v. *Greaney,* supra.

In the present posture of the case it is sufficient merely to observe, without descanting, that the alleged oral agreement would, in any event constitute no defense to the plaintiff's claim on the note in view of the parol evidence rule, the note upon which suit is brought having been made in 1936 and the oral agreement alleged to have been made in 1931.

An examination of the record in this case and the opinions below make it abundantly plain that the issue presented here is narrow and of no general importance. The court below did not fail to follow applicable federal decisions; indeed, it did so; and the case turns upon its own peculiar facts.

Conclusion

We respectfully submit that the decision of the court below is correct, and that its decision involves no federal question of subtsance or general importance which remains unsettled by this Court. Petitioners have not demonstrated that the case warrants the allowance of a writ of certiorari; the petition for a writ should therefore be denied.

Respectfully submitted,

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